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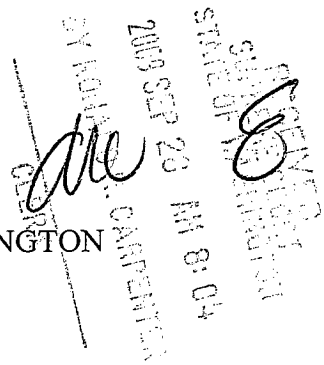

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re John R. Scannell, Lawyer (Bar No. 31035).	Supreme Court No. ASSOCIATION'S PETITION FOR INTERIM SUSPENSION (ELC 7.2(a)(2))

As required by Rule 7.2(a)(2) of the Rules for Enforcement of Lawyer Conduct (ELC), the Washington State Bar Association (Association) petitions this Court for an Order suspending Respondent John R. Scannell from the practice of law during the remainder of disciplinary proceedings against him. This petition is based on the Disciplinary Board Order entered on September 1, 2009 and attached hereto as Appendix A. The Disciplinary Board unanimously recommended that Respondent be disbarred.

I. NATURE OF THE MISCONDUCT

The Board unanimously recommended that Respondent be disbarred for intentionally and repeatedly refusing to cooperate in two investigations, as described below. Both the Hearing Officer and the Board found that Respondent violated RPC 3.1 and 8.4(*l*) in his prolonged efforts to delay and frustrate the Association's investigations.

A. THE MATTHEWS INVESTIGATION

On October 3, 2003, Paul Matthews was charged with two counts of first degree theft and one count of first degree trafficking in stolen property. FFCL ¶ 1.1.2;[1] EX 104.[2] His wife, Stacey Mathews, was charged in the same information with one count of first degree trafficking in stolen property. FFCL ¶ 1.1.2; EX 104. The charges related to some computers that Mr. Matthews allegedly stole from his employer, the Washington State Department of Transportation (WSDOT), and from another WSDOT employee. FFCL ¶ 1.1.2; EX 101, 104; TR2[3] 123. Respondent represented both Paul and Stacey Matthews in their criminal case. FFCL ¶ 1.1.3; TR2 94-95; EX 105-07, 109, 114-15, 120-21.

Before and during his representation of Paul and Stacey Matthews in their criminal case, Respondent also represented Paul Matthews in two civil cases. FFCL ¶ 1.1.3; TR2 84-86. At the same time, Mr. Matthews worked in Respondent's office on the understanding that the work he did there would offset his legal fees. TR2 84-85, 99. The terms of this transaction, including the rate at which Mr. Matthews' work for

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[1] "FFCL" refers to the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Sanction (BF 121), attached hereto as Appendix B.

[2] Unless otherwise indicated, the exhibits cited are the Association's exhibits, numbered A-100, A-101, etc. Respondent's two exhibits are cited as R-1 and R-2.

[3] The disciplinary hearing took place on December 1-4, 2008. "TR1" refers to the transcript of December 1, 2008; "TR2" to the transcript of December 2, 2008; etc.

Respondent would offset his legal fees, were never reduced to writing. TR2 85, 99.

One of the two civil cases concerned claims by Paul Matthews against WSDOT for wrongful discharge and unpaid wages. FFCL ¶ 1.1.3; TR2 83-84. Respondent represented Mr. Matthews in that case on a contingent fee basis, and Respondent believed that the case could result in the largest legal fee of his career. FFCL ¶ 1.1.3; TR2 85; TR3 27-28. Respondent undertook the joint representation of Paul and Stacey Matthews in their criminal case in order to prevent that case from having any adverse effect on the civil case against WSDOT. FFCL ¶ 1.1.3; TR2 98.

Respondent's strategy for preserving Mr. Matthews' case against WSDOT, and his own contingent fee, was to have both his clients enter Alford[4] pleas in the criminal case. FFCL ¶ 1.1.3; EX 114-15; TR2 90-91. Accordingly, Respondent reached an agreement with the prosecution whereby Stacey Matthews would plead guilty to the original charge of first degree trafficking, a level IV offense under the Sentencing Reform Act (SRA), while Paul Matthews would plead guilty to reduced charges of second degree theft and second degree trafficking, both level III offenses under the SRA. FFCL ¶ 1.1.3; TR2 125-33; EX 107-10. The other first

[4] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

degree theft charge against Paul Matthews would be dismissed. TR2 131-32; EX 109, 113.

On February 24, 2004, Paul and Stacey Matthews entered Alford pleas under the agreement negotiated by Respondent, and on March 26, 2004, they were sentenced. EX 114-15, 120-21. Although they had identical offender scores of 2, Paul Matthews had a lower standard sentence range because he pleaded guilty to level III offenses, while Stacey Matthews pleaded guilty to a level IV offense. EX 107-09; TR2 132-33. Consequently, Paul Matthews was sentenced to five months in work release, while Stacey Matthews was sentenced to 12 months in prison. EX 108, 110, 120-21. Stacey Matthews' sentence was to run concurrently with a sentence previously imposed in another matter that was then on appeal. EX 121; TR2 136.

Later, Stacey Matthews consulted lawyer Douglas Stratemeyer about the representation she had received from Respondent. TR2 153. After discussing the case with Ms. Matthews and reviewing the court file, Mr. Stratemeyer filed a Motion to Withdraw Guilty Plea on behalf of Stacey Matthews based on "a prejudicial conflict of interest on the part of defense counsel due to representation of multiple defendants." TR2 154-59; EX 122. For reasons unknown, however, Ms. Matthews apparently abandoned the attempt to withdraw her guilty plea, and the motion was

never ruled upon. TR2 159-60.

Respondent knew that his representation of Paul Matthews might be materially limited by his responsibilities to Stacy Matthews or his own interests. FFCL ¶ 1.1.4; TR3 28; Formal Complaint & Answer ¶ 9.[5] Likewise, Respondent knew that his representation of Stacey Matthews might be materially limited by his responsibilities to Paul Matthews or his own interests. FFCL ¶ 1.1.4; TR3 28; Formal Complaint & Answer ¶ 10. Mr. Matthews testified that Respondent had "mentioned a conflict of interest," but did not discuss or explain it in any detail. TR2 88-92. It is undisputed that neither Paul Matthews nor Stacey Matthews ever consented in writing to the common representation. FFCL ¶ 1.1.5; TR3 28; Formal Complaint & Answer ¶¶ 11-12.

On February 24, 2005, the Association opened a grievance against Respondent based on a letter from King County Superior Court Judge Helen L. Halpert. FFCL ¶ 1.2.2; EX R-1, R-2. On May 9, 2005, Disciplinary Counsel sent Respondent a request for documents and information under ELC Rule 5.3(e). FFCL ¶ 1.2.2; EX 402. Disciplinary Counsel requested (1) copies of any documents by which Paul Matthews and/or and Stacey Matthews consented to common representation[6] and (2)

[5] The Formal Complaint and the Answer are at BF 3 and BF 9, respectively.
[6] See former RPC 1.7(b).

a description of the terms of any business transaction Respondent entered into with Paul Matthews together with copies of any documents by which those terms were transmitted in writing to Mr. Matthews.[7] EX 402.

Instead of promptly responding to this request, Respondent requested a deferral of the investigation and indicated that he would not respond until "the appeals on this request have been exhausted." FFCL ¶ 1.2.3; EX 403; TR3 95. As the basis for deferral, Respondent cited two cases, King v. Matthews and Matthews v. WSDOT, which he said were "still active." FFCL ¶ 1.2.3; EX 403. King v. Matthews was a lawsuit by Respondent's mentor, lawyer Paul H. King, against Paul Matthews concerning some posters that Mr. Matthews allegedly took from Mr. King. TR3 80-81; EX 400. Matthews v. WSDOT was the lawsuit for wrongful discharge and unpaid wages described above. TR3 81; EX 401. Respondent could not articulate any meaningful connection between these two cases, on the one hand, and the information requested under ELC 5.3(e), on the other. TR3 81-87.

At his 2004 disciplinary hearing, Respondent testified that "the best way to deal with the Bar Association is to slow them down," and that one of the strategies he routinely used to "slow the Bar down" was to request a deferral "whenever [he] would get a bar complaint." TR3 73-76;

[7] See RPC 1.8(a).

EX 404. Even if his request were denied, Respondent expected that he could "stall the investigation" until a Review Committee determined that the request was properly denied.[8] TR3 75-76. In this case, Respondent provided no reasonable basis for his deferral request, which was intended to delay, and did delay, the Association's investigation. FFCL ¶ 1.2.3; EX 404.

Further correspondence with Respondent produced no information concerning either (a) the terms under which Paul Matthews worked in Respondent's office in exchange for legal services or (b) which implications of the common representations, if any, Respondent supposedly explained to Paul and Stacey Matthews. EX 404, 406-07, 409. Respondent merely asserted that he had provided his clients "a full explanation of the conflict," an assertion that was at odds with (a) information provided by one of Respondent's clients and (b) the Motion to Withdraw Guilty Plea previously filed. TR4 95-96; EX 122, 406.

On October 18, 2005, Respondent was served with a subpoena duces tecum under ELC 5.5 commanding him to appear at a deposition on October 26, 2005. FFCL ¶ 1.2.4; EX 413. To accommodate Respondent's schedule, the deposition was continued to November 1,

[8] See ELC 5.3(c)(2). A Review Committee made that determination on August 30, 2005. EX 412.

2005. FFCL ¶ 1.2.4; EX 414-15. Respondent made no objection to the subpoena duces tecum before the date of his deposition. TR3 96; EX 414; EX 416 at 8-10. On the date of the deposition, however, Respondent refused to produce any documents or answer any questions, asserting that the deposition was "oppressive." FFCL ¶ 1.2.4; EX 416 at 7.

Two days later, Respondent filed a motion to terminate the deposition, arguing that it was "oppressive" because, in his view, the facts were "straightforward and . . . not in dispute." FFCL ¶ 1.2.5; EX 417 at 4. Respondent also attempted to "slow the bar down" by making yet another deferral request. EX 419, 422. Respondent's objections were frivolous and were made for the purpose of delaying and frustrating the Association's investigation, in keeping with Respondent's stated view that "the best way to deal with the Bar Association is to slow them down." FFCL ¶ 1.2.5; TR3 74-76; EX 418. Respondent's conduct resulted in harm to the lawyer discipline system in the form of increased cost and delay. FFCL ¶ 1.2.6.

Respondent's motion was denied. EX 421. Respondent was served with another subpoena duces tecum under ELC 5.5 commanding him to appear at a deposition on May 4, 2006. EX 423. On the afternoon of May 3, 2006, Respondent informed Disciplinary Counsel that he would be "unable to attend" due to a scheduling conflict. EX 424. Once again,

the deposition was continued to accommodate Respondent's schedule. EX 425. Respondent was finally deposed concerning the Matthews matter on May 11, 2006. TR3 101-02. Given a copy of the deposition transcript, Respondent was unable to identify a single question or even a single word that was "oppressive," discourteous, or impolite, but he accused Disciplinary Counsel of acting like a "fascist" merely by issuing the subpoena. TR1 56; TR3 102-03.

B. THE RAHRIG INVESTIGATION

For about nine years before he established his own law practice, Respondent worked for lawyer Paul H. King as a paralegal, a law clerk, a Rule 9 intern,[9] and a lawyer. TR3 29-30; TR4 10-12. As Respondent's tutor in the law clerk program, Mr. King was instrumental in helping Respondent obtain his law license. TR3 29-30; TR4 10-12; see also APR 6.

On April 25, 2002, the first of Mr. King's three disciplinary suspensions took effect. EX 200-01. On April 24, 2002, knowing that the suspension would take effect the next day, Respondent bought all of Mr. King's active cases. TR3 30-31. A law firm known as "Action Employment Law" or "Actionlaw.net" was established so that Respondent could keep Mr. King's law practice going while he was suspended. TR3

[9] See APR 9.

31. Respondent, who was the only lawyer in the firm, maintained an office next door to Mr. King's and consulted with him regularly about the cases Mr. King had sold to him. TR3 32.

In the spring of 2004, Kurt Rahrig contacted Actionlaw.net about a claim for breach of contract against his former employer, Alcatel USA. TR1 60-61. On September 3, 2004, after he was reinstated following his first two disciplinary suspensions, Mr. King signed a contingent fee agreement with Mr. Rahrig. TR1 79; EX 207. The fee agreement states that Mr. Rahrig "hereby retains John Scannell, Actionlaw.net and Paul H. King" to represent him in his dispute with Alcatel USA. EX 207. Respondent did not sign the fee agreement, and he claims to have been unaware of it. EX 207; TR4 53. Although Mr. Rahrig met Respondent on visits to Mr. King's office, he never consulted with Respondent, and Respondent was never his lawyer. TR1 79-80, 82; EX 411.

Meanwhile, on August 15, 2002, the United States District Court for the Western District of Washington entered an order suspending Mr. King from practice in that court for three years. EX 202, 245. On October 21, 2004, this Court ordered Mr. King to show cause under ELC 9.2(c) why the same discipline should not be imposed in the State of Washington. EX 210. On March 9, 2005, this Court entered an order reciprocating discipline in part and suspending Mr. King from the practice

of law in the State of Washington until August 13, 2005.[10] EX 242. Respondent knew of the March 9, 2005 suspension order because he represented his former tutor in the reciprocal discipline proceeding. TR3 37; EX 246.

On the evening of March 9, 2005, just after the order of suspension was entered, an email message was sent to Mr. King's opposing counsel in Rahrig v. Alcatel from actionlaw@w-link.net, the email address that appears on Respondent's website.[11] TR1 177-83; TR2 10-11, 14; EX 243, 324. The message stated:

> Please have pleadings addressed to Actionlaw.net John Scannell Attorney from now on. Mr. King is taking a leave. Same address as before.

EX 243. After that date, opposing counsel served all their motion papers and discovery documents on Respondent. TR2 15-27; EX 252, 269-73, 278-80, 303, 306, 316-17. Respondent's name appeared on the certificates of service as one of the "Attorneys for Plaintiff Kurt Rahrig." EX 271-73, 279-80.

Meanwhile, instead of "taking a leave," Mr. King continued to act

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[10] Later, this Court entered a corrective order stating that Mr. King's suspension would expire on June 7, 2005. EX 326.

[11] Respondent appears to dispute that the website is or was his. The website does, however, contain Respondent's photograph, mailing address, and fax number, as well as the statement that "ActionLaw.net and Action Employment Law are the names for a law firm headed by 'Zamboni John' Scannell." EX 324. There is no mention anywhere of Mr. King. Id.

as Mr. Rahrig's lawyer without notifying Mr. Rahrig of his March 9, 2005 suspension.[12] TR 1 85-117. In the extensive correspondence relating to his representation of Mr. Rahrig both before and after his March 9, 2005 suspension, Mr. King used the email address that appears on Respondent's website. TR1 63-114; EX 243, 249-51, 253, 257, 265, 274-76, 281-88, 290, 308. On at least one occasion when Respondent knew that Mr. King was suspended, Respondent saw Mr. Rahrig in Mr. King's office when he was there to consult with Mr. King about Rahrig v. Alcatel. TR1 116-17.

On or about May 31, 2005, Mr. Rahrig discovered that Mr. King was suspended and informed him by email that he was terminating their attorney client relationship. TR1 118-19; EX 318. The email message was forwarded to Roger Knight, a paralegal who worked for both Mr. King and Respondent. TR1 119-20; TR3 55; EX 320. Mr. Knight replied to Mr. Rahrig by pointing out that "John Scannell is on the fee agreement and he is still active in his membership in the Bar and can still practice law." EX 320. Mr. Knight also stated that Mr. King had "transferred the case to Mr. Scannek [sic] on March 9, 2005." TR1 120-21, 126; EX 321.

A few days later, Mr. Rahrig filed a grievance against Respondent.

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[12] See RCW 2.48.180; ELC 14.1, 14.2; former RPC 5.5(e), 8.4(a), 8.4(b), 8.4(c), 8.4(j), 8.4(*l*).

EX 405. After some delay,[13] Respondent provided a written response in which he stated that he had never been Mr. Rahrig's lawyer, that he had never consulted with Mr. Rahrig, and that he had never acquainted himself with Rahrig v.Alcatel. EX 411. He admitted however, that he had received the documents that were served on him by Mr. King's opposing counsel in Rahrig v. Alcatel, and that he had spoken with Mr. King about them. EX 411. Those documents identified Respondent as one of the "Attorneys for Plaintiff Kurt Rahrig" in Rahrig v. Alcatel. EX 252, 269-73, 278-80, 303, 306, 316-17. Respondent nevertheless claimed to be wholly ignorant of the fact that his name and trade name were being used by a suspended lawyer for the practice of law. TR3 54; EX 411; see former RPC 5.5(d)(3).

On October 18, 2005, Disciplinary Counsel served Respondent with a subpoena duces tecum under ELC 5.5 commanding him to appear at a deposition on October 26, 2005. FFCL ¶ 1.3.2; EX 413. To accommodate Respondent's schedule, the deposition was continued to

[13] FFCL ¶ 1.3.2. On June 6, 2005, Disciplinary Counsel requested that Respondent provide a response by June 20, 2005. EX 405. At 5:23 p.m. on June 20, 2005, Respondent faxed a letter to Disciplinary Counsel asking that he be allotted "the full 30 days" for his response, citing ELC 5.3(f). EX 408. On July 12, 2005, after Respondent had failed to respond, Disciplinary Counsel sent Respondent a "ten-day" letter under ELC 5.3(f) directing Respondent to respond by July 25, 2005. EX 410. Respondent then prepared a response dated July 22, 2005 that he faxed to Disciplinary Counsel at 4:57 p.m. on July 25, 2005. EX 411.

November 1, 2005. FFCL ¶ 1.3.2; EX 414-15. Respondent made no objection to the subpoena duces tecum before the date of his deposition. TR3 96; EX 414; EX 416 at 8-10. On the date of the deposition, however, Respondent refused to produce any documents or answer any questions, asserting that the deposition was "oppressive." FFCL ¶ 1.3.2; EX 416 at 7.

On November 3, 2005, Respondent filed his first motion to terminate the deposition. FFCL ¶ 1.3.3; EX 417. Respondent argued that he could not be deposed because, according to him, "it is unclear what Scannell is being accused of in the Rahrig matter." EX 417. Respondent also asserted that the "the proper forum" for Mr. Rahrig's grievance against him was Virginia, even though Respondent is admitted to practice law in Washington, not Virginia. TR3 104-07; EX 417 at 7-8. Respondent's objections were frivolous and were made for the purpose of delaying and frustrating the Association's investigation, in keeping with Respondent's stated view that "the best way to deal with the Bar Association is to slow them down." FFCL ¶ 1.3.3; TR3 74-76; EX 418.

Respondent's motion was denied. EX 421. On May 11, 2006, Respondent was served with a second subpoena duces tecum commanding him to appear and produce documents at a deposition on May 19, 2006 at 2:00 p.m. FFCL ¶1.3.4; EX 427. About an hour and a half before the

deposition was to begin, Respondent came to the Association's office to personally deliver a letter stating that he would not come to the deposition because "travel fees" had not been tendered. FFCL ¶ 1.3.4; EX 428-30. As the basis for his refusal to attend the deposition, Respondent cited RCW 2.40.020, a statute applicable by its plain language only to "civil cases," not to investigations or proceedings under the ELC. FFCL ¶ 1.3.4; EX 428. Respondent's refusal to appear and produce documents was motivated by an intent to delay and frustrate the Association's investigation, not by a good faith procedural objection. FFCL ¶ 1.3.4.

On June 13, 2006, Respondent was served with a third subpoena duces tecum commanding him to appear and produce documents at a deposition on June 23, 2006. FFCL ¶ 1.3.5; EX 431. Rather than waste time litigating with Respondent over the expense of the 1.3 mile journey from Respondent's office to the Association's office, the Association tendered a $12 check to cover Respondent's "travel fees." FFCL ¶ 1.3.5; EX 432. On June 23, 2006, Respondent appeared briefly but refused to be sworn, refused to answer questions, refused to produce any of the documents identified in the subpoena duces tecum, and left abruptly before the deposition was adjourned. FFCL ¶ 1.3.5; EX 433.

Almost two weeks later, on July 6, 2006, Respondent filed a second motion to terminate the deposition that had not begun due to

Respondent's refusal to comply with any of the three subpoenas duces tecum that had been served on him. FFCL ¶ 1.3.5; EX 434. For the most part, Respondent's second motion to terminate was a reprise of his first motion to terminate. Compare EX 417 with EX 434. To the arguments that had previously been rejected, Respondent added a claim that his deposition could not be taken unless notice was served on Mr. King, an objection that Respondent could have raised in his first motion to terminate, but did not. EX 417, 434. Respondent claimed that Mr. King was a "party to the action" even though (1) no action had been commenced and (2) the matter in which Respondent had been commanded to testify was the investigation of a grievance against Respondent himself. EX 434-35. Respondent's refusal to testify and produce documents at the June 23, 2006 deposition lacked a factual basis and was motivated by an intent to delay and frustrate the Association's investigation. FFCL ¶ 1.3.5; EX 435.

On August 17, 2006, Respondent's second motion to terminate the deposition was denied. FFCL ¶ 1.3.6; EX 439. Respondent was ordered to appear for a deposition and produce documents in accordance with the three subpoenas duces tecum previously served on him. FFCL ¶ 1.3.6; EX 439. Respondent was informed that his deposition would resume on September 1, 2006. EX 440.

On August 25, 2006, Respondent filed a motion to set aside the order denying his second motion to terminate the deposition. FFCL ¶ 1.3.7; EX 441. In the alternative, Respondent moved for a stay pending an appeal to this Court, an appeal he never filed. EX 441. Respondent asserted that the order should be vacated because "it appears that the person who should be ruling on this motion would be the chief hearing officer," even though (1) the Chief Hearing Officer has no authority to make any rulings in a matter that has not been ordered to hearing, (2) Respondent never raised this objection to the order denying his first motion to terminate, and (3) Respondent had specifically addressed his motion to the Chair of the Disciplinary Board, not to the Chief Hearing Officer. FFCL ¶ 1.3.7; TR3 107-11; EX 436, 438, 441-42. Respondent's motion to set aside or stay was motivated by an intent to delay and frustrate the Association's investigation, not by a good faith objection. FFCL ¶ 1.3.7.

Respondent's motion to set aside or stay was denied. FFCL ¶ 1.3.7; EX 446. Respondent's deposition was continued to September 25, 2006 to accommodate Respondent's schedule. FFCL ¶ 1.3.8; EX 443, 444. On September 6, 2006, Respondent informed Disciplinary Counsel of some potential scheduling problems, but stated that the September 25, 2006 deposition date "appears to work." EX 445. On September 25,

2006, however, shortly before the deposition was to begin, Respondent sent a fax to the Association stating that he would not attend. FFCL ¶ 1.3.8; EX 447-48. Respondent's refusal to testify and produce documents at the September 25, 2006 deposition was motivated by an intent to delay and frustrate the Association's investigation, not by a well-grounded procedural objection. FFCL ¶ 1.3.9.

Respondent never allowed his deposition to be taken, and he never produced any of the documents called for by the three subpoenas duces tecum that were served on him in the Rahrig matter until the next-to-last day of the disciplinary hearing. BF 72, 81, 85, 96; TR2 187-90; TR3 6-11; FFCL ¶ 1.3.10. Respondent admitted that there might be other documents within the scope of the subpoenas that he had not produced. TR3 6-11; FFCL ¶ 1.3.10.

II. PROCEEDINGS BELOW

The Formal Complaint, filed May 30, 2007, alleged four counts of misconduct, as follows:[14]

> By representing multiple clients in a single matter without their written consent to the common representation after consultation and a full disclosure of the material facts, including an explanation of the implications of the common representation and the advantages and risks involved, Respondent violated RPC 1.7(b). (Count 1)

[14] All references to the RPC are to the Rules in effect at the time of the alleged misconduct. Formal Complaint (BF 3) at n.1; FFCL at 1-2.

> By failing to promptly respond to disciplinary counsel's requests for information [concerning the Matthews matter], by refusing to produce documents and answer questions at his deposition, by asserting frivolous objections to disciplinary counsel's requests for information, by making a frivolous deferral request, and/or by filing a frivolous motion to terminate his deposition, all of which were intended to obstruct and delay the Association's investigation, Respondent violated RPC 3.1, RPC 3.4(a), RPC 3.4(c), RPC 3.4(d), RPC 8.4(d), and/or RPC 8.4(*l*) (through violation of duties imposed by ELC 5.3 and 5.5). (Count 2)
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> By permitting Mr. King, a suspended lawyer, to use Respondent's name and/or his trade name for the practice of law, and/or by knowingly assisting Mr. King in violating and/or attempting to violate RPC 5.5(e), RPC 8.4(b) (through violation of RCW 2.48.180), RPC 8.4(*l*) (through violation of a duty imposed by ELC 14.2), and/or RPC 8.4(j), Respondent violated RPC 5.5(d)(3) and/or RPC 8.4(a). (Count 3)
>
> By failing to promptly respond to disciplinary counsel's requests for information [concerning the Rahrig matter], by refusing to allow his deposition to be taken, by failing to produce any of the documents called for by the subpoenas duces tecum, by filing frivolous motions intended to obstruct and delay an investigation, and/or by disobeying orders denying those motions, Respondent violated RPC 3.1, RPC 3.4(a), RPC 3.4(c), RPC 3.4(d), RPC 8.4(d), RPC 8.4(j), and/or RPC 8.4(*l*) (through violation of duties imposed by ELC 5.3 and 5.5). (Count 4)

Formal Complaint ¶¶ 20, 37, 55, 82.

After the Formal Complaint was filed, Respondent began a concerted effort to delay and frustrate the disciplinary proceeding, consistent with his efforts to delay and frustrate the investigations that preceded it. Respondent coordinated those efforts with his mentor, lawyer

Paul H. King, whom Respondent considered an authority on legal ethics. TR3 135-38. Respondent made repeated, frivolous attempts to disqualify everyone who could adjudicate the allegations against him. See, e.g., BF 7, 14, 16, 18-24, 28, 30, 33, 49, 53, 92, 95 at 2; TR1 5-14. Respondent made motions "to have the Washington State Bar Association convene to pass a rule" to have his case adjudicated by a special tribunal in a different state. BF 18, 49; TR3 131-38. Respondent was unable to explain either (1) how such a convention would take place or (2) under what authority the Association could "pass a rule" governing proceedings that are governed by rules adopted by this Court. TR3 131-38. Respondent admitted that he had not bothered to consult those rules, since he was "relying upon Paul King." TR3 136-37.

Respondent opposed the setting of any hearing until after December 2009, and he repeatedly sought to postpone the hearing after it was set. BF 38, 40, 42, 44-45, 45.10, 75, 81, 85, 86, 92, 100-01. Respondent sought to require the Association to make a detailed review of all of its grievance files dating back to 1997. BF 50, 55, 64. And Respondent failed to comply with the Association's ELC 10.13(c) Demand for Documents, which referenced the same documents the Association had sought from Respondent via subpoena duces tecum for over three years. EX 413, 427, 431; BF 72, 81, 85, 96, 100-01; TR2 187-

90; TR3 6-11; FFCL ¶ 1.3.10.

The disciplinary hearing finally took place on December 1-4, 2008. The Hearing Officer dismissed Count 3 at the close of the hearing. TR4 121. On February 3, 2009, the Hearing Officer entered his Findings of Fact, Conclusions of Law, and Recommended Sanction. The Hearing Officer concluded (1) that Respondent violated RPC 1.7(b) as charged in Count 1, (2) that Respondent violated RPC 3.1 and 8.4(*l*) as charged in Count 2, and (3) that Respondent violated RPC 8.4(*l*) as charged in Count 4. FFCL ¶¶ 2.1-3. With respect to Counts 2 and 4, the Hearing Officer repeatedly found that Respondent acted with the objective or purpose of delaying and frustrating the Association's investigation.[15] In other words, Respondent's repeated violations of RPC 3.1 and 8.4(*l*) were intentional. See In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 281, 66 P.3d 1069 (2003) (lawyer's conduct intentional when he has "the conscious objective or purpose to accomplish a particular result"); ABA

[15] See, e.g., FFCL ¶ 1.2.3 (request for deferral motivated by intent to delay Association's investigation), FFCL ¶ 1.2.5 (objections interposed for the purpose of delaying and frustrating Association's investigation), FFCL ¶ 1.3.3 (objections interposed for purpose of delaying and frustrating Association's investigation), FFCL ¶ 1.3.4 (failure to appear and refusal to produce documents motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.5 (failure to produce documents and refusal to testify motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.7 (motion to set aside or stay motivated by intent to delay and frustrate Association's investigation), FFCL ¶ 1.3.9 (failure to appear and give testimony and failure to produce documents motivated by intention to delay and frustrate Association's investigation).

Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) Definitions at 17.

Notwithstanding his findings that Respondent's misconduct was intentional, the Hearing Officer incorrectly concluded that the presumptive sanction for Respondent's "knowing" violations of RPC 3.1 and 8.4(*l*) was suspension.[16] FFCL ¶¶ 2.6-7. The Hearing Officer recommended that Respondent be suspended for two years, and that the suspension continue until Respondent provides satisfactory proof that all the documents within the scope of the Association's subpoenas duces tecum have been produced. FFCL ¶ 3.1

The matter came before the Disciplinary Board for review under ELC 11.2(b)(1). Both parties submitted briefs under ELC 11.8. Respondent refused to concede that either the Hearing Officer or the Board had authority to act, and he demanded that all the Board members resign *en masse*. BF 126 at 1, 133 at 1, 135 at 1, 137 at 1. They did not. Based on the Hearing Officer's findings that Respondent's misconduct was intentional, the Board unanimously concluded that the presumptive sanction was disbarment under ABA Standards std. 7.1. Disciplinary

[16] The Hearing Officer also concluded that the presumptive sanction for Respondent's violation of RPC 1.7 was a reprimand under ABA Standards std. 4.33. FFCL ¶ 2.5.

Board Order at 2.[17] The Board unanimously recommended that Respondent be disbarred. Id.

On September 16, 2009, Respondent filed yet another motion to disqualify the Board. BF 144. This time Respondent asserted that the Board members should be disbarred for, among other things, "a remarkable lack of competency [sic] and diligence under RPC 1.1 and RPC 1.3." BF 144 at 5. Like many of Respondent's motions, it is not clear to whom this motion is directed.[18] For although the caption states that it is "Before the Disciplinary Board of the Washington State Bar Association," Respondent refused to concede that the Board could rule on it.

Also on September 16, 2009, Respondent filed a notice of appeal to this Court. BF 145.

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[17] Although the Board Order states in its preamble that the decision was entered after "[h]aving heard oral argument and reviewed the materials submitted by the parties, and the applicable case law and rules," there was in fact no oral argument because neither party requested one. See ELC 11.12(c).

[18] See, e.g., Respondent's "Motion to Disqualify Entire Disciplinary Board for Misconduct, Violations of the Appearance of Fairness Doctrine, Motion to Dismiss for Prosecutorial Misconduct, Demand for Explanation on the Record of Ex Parte Contacts, Motion to Supplement the Record." BF 137. Respondent suggested that this motion "might be" heard by a Conflicts Review Officer, but he refused to concede that a Conflicts Review Officer or "any other member of the disciplinary board" [sic] has "jurisdiction" to hear it. Id. at 1. Hearing motions is not, of course, one of the functions of a Conflicts Review Officer, who is not, moreover, a "member of the disciplinary board." See ELC 2.7.

ARGUMENT

When the Board enters a decision recommending disbarment, disciplinary counsel must file a petition for the respondent's suspension during the remainder of the proceedings. ELC 7.2(a)(2). The respondent *must be* suspended absent an affirmative showing by the respondent that his continued practice of law will not be detrimental to the integrity and standing of the bar and the administration of justice, or contrary to the public interest. Id. The rule creates a presumption that when the Board recommends disbarment, the respondent's continued practice of law *will be* detrimental to the integrity and standing of the bar and the administration of justice, and contrary to the public interest. That presumption is even stronger where, as here, the Board's decision is unanimous.

Respondent's conduct in this and other disciplinary matters reinforces the presumption that his continued practice of law will be detrimental to the integrity and standing of the bar and the administration of justice, and contrary to the public interest. Internal investigation and self-regulation are essential to the legal profession. In re Disciplinary Proceeding Against Clark, 99 Wn.2d 702, 707-08, 663 P.2d 1339 (1983). Within a system of self-regulation, the investigation of complaints depends on the lawyer's cooperation. Id. Unfortunately, Respondent has

made it clear that he will never cooperate in any investigation because he does not accept the legitimacy of the lawyer discipline system as it applies to him.

Respondent asserts the right to disregard any subpoena, court rule, or order if he deems it "illegitimate," or "oppressive." BF 126 at 9, 15, 17. According to Respondent, a simple attempt to take his deposition under ELC 5.5 is part of a nefarious plot by "fascists" to establish "a police state in its purest form," and anyone who investigates any alleged or apparent misconduct on his part may be likened to Hitler, Mussolini, and Stalin. See TR1 28-29, 56; BF 126 at 1, 14-15. According to Respondent, anyone who can adjudicate any allegation of misconduct against him must be biased, and any proceeding in which such an allegation can be adjudicated is a "sham," a "mockery of justice," and "the equivalent of the Court of the Mad Hatter." See, e.g., BF 7, 14, 16, 18-24, 28, 30, 33, 49, 53, 92, 95 at 2, 126 at 14-16, 135 at 9-10; TR1 5-14.

Respondent's refusal to cooperate and his refusal to accept the legitimacy of the lawyer discipline system are not limited to this particular case. Five years ago, at his first disciplinary hearing, Respondent announced that "the best way to deal with the Bar Association is to slow them down." TR3 73-76; EX 404. He even explained a few of the techniques that he used "whenever [he] would get a bar complaint" to

"stall the investigation" and to "slow the Bar down." TR3 73-76; EX 404. In a different disciplinary proceeding that is ongoing at this time,[19] Respondent once again refuses to "concede jurisdiction in any way." Response to Motion for Protective Order, Response [sic] to Motion to Allow Discovery; Motion to Remand to Review Committee, Motion for 30(b)(6) Deposition of Davis Wright Tremain [sic] at 1.[20] He apparently contends that that proceeding is just an attempt to "cover misconduct by members of the [D]isciplinary [B]oard" and to retaliate against him for making a complaint about a former Attorney General some nine years ago. Id. at 3.

Respondent effectively refuses to be a part of the system of professional self-regulation that this Court has adopted through the Rules for Enforcement of Lawyer Conduct. He proudly proclaims that he "will *never* accept the legitimacy of such a system." BF 135 at 10 (emphasis added). To allow Respondent to continue the same course of conduct after a unanimous Disciplinary Board decision recommending his disbarment would be detrimental to the integrity and standing of the bar and the administration of justice, and contrary to the public interest.

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[19] Public No. 08#00074.

[20] Attached hereto as Appendix C.

CONCLUSION

Under ELC 7.2(a)(2), the Association asks the Court to issue an Order requiring Respondent John R. Scannell to appear before this Court on a date certain to show cause why this petition should not be granted. The Association further requests that the Court issue an order on that date immediately suspending Respondent from the practice of law.

DATED THIS 25th day of September, 2009.

Respectfully submitted,

WASHINGTON STATE BAR ASSOCIATION

Scott G. Busby, Bar No. 17522
Disciplinary Counsel
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APPENDIX A

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **JOHN R. SCANNELL,** Lawyer (WSBA No. 31035)	Proceeding No. 05#00113 DISCIPLINARY BOARD ORDER

This matter came before the Disciplinary Board at its July 24, 2009 meeting, on automatic review of Hearing Officer Timothy J. Parker's decision recommending a two-year suspension following a hearing.

Having heard oral argument and reviewed the materials submitted by the parties, and the applicable case law and rules,

IT IS HEREBY ORDERED THAT the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation are amended as follows[1]:

2.2 In failing to comply with the Association's subpoena *duces tecum* and in failing to cooperate in the Association's investigation of Respondent's joint representation of Paul Matthews and Stacey Mathews and in being motivated by intention to delay and frustrate the

[1] The vote was unanimous. Those voting were: Anderson, Bahn, Barnes, Cena, Coppinger-Carter, Greenwich, Handmacher, Meehan, Stiles and Ureña.

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Association's investigation, Respondent intentionally violated RPC 3.1 and RPC 8.4(l).[2]

2.3 In failing to comply with the Association's subpoena *duces tecum* and the Association's investigation of Mr. Rahrig's grievance and in being motivated by intention to delay and frustrate the Association's investigation, Respondent intentionally violated RPC 8.4(l).[3]

2.6 Count II. The presumptive sanction for Respondent's intentional violation of RPCs 3.1 and 8.4(l) is disbarment pursuant to ABA Standard 7.1.[4]

2.7 Count IV. The presumptive sanction for Respondent's intentional violation of RPC 8.4(l) is disbarment pursuant to ABA Standard 7.1

2.8.5 This aggravator is deleted. The Matthews do not fit the legal definition of vulnerable victims.

3.1 The Board recommends that the Court disbar Mr. Scannell.

Dated this 1st day of September, 2009.

H.E. Stiles, II, Acting Chair
Disciplinary Board

[2] Original 2.2 stated as follows: "In failing to comply with the Association's subpoena *duces tecum* and in failing to cooperate in the Association's investigation of Respondent's joint representation of Paul Matthews and Stacey Matthews and in being motivated by intention to delay and frustrate the Association's investigation, Respondent knowingly violated RPC 3.1 and RPC 8.4(l).

[3] Original 2.3 stated as follows: " In failing to comply with the Association's subpoena *duces tecum* and the Association's investigation of Mr. Rahrig's grievance and in being motivated by intention to delay and frustrate the Association's investigation, Respondent knowingly violated RPC 8.4(l).

[4] Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the Disciplinary Board Order
to be delivered to the Office of Disciplinary Counsel and to be mailed
to John Scanlan, Respondent/~~Respondent's~~ Counsel
at PO BOX 3254 Seattle, WA 98114 by certified/first class mail
postage prepaid on the 1 day of September, 2004.

Clerk/Counsel to the Disciplinary Board

APPENDIX B

BEFORE THE DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re JOHN R. SCANNELL, Lawyer (WSBA No. 31035)	NO. 05#00113 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED SANCTION

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct ("ELC"), a hearing was held before the undersigned Hearing Officer December 1, 2, 3 and 4, 2008. Respondent Scannell appeared pro se. Disciplinary Counsel Scott Busby and Linda Eide appeared for the Association. Upon the Association resting its case, Respondent moved to dismiss Counts I and III. The motion to dismiss Count I was denied. The motion to dismiss Count III was granted on the grounds that the Association's evidence could not be found to establish the elements of Count III by a clear preponderance of the evidence.

I. FINDINGS OF FACT

The Respondent was charged by Formal Complaint dated May 30, 2007, with four counts of violation of the Rules of Professional Conduct in effect at the time of the alleged

misconduct. Findings of Fact, Conclusions of Law and the Recommendation with regard to Counts I, II and IV are as follows:

1.1 Count I

1.1.1 Respondent is charged in Count I of the Association's Formal Complaint with failing to provide his clients Paul Matthews and Stacey Matthews with a full disclosure of material facts relating to his representation of both in a criminal matter and failing to obtain written consent to joint representation from the clients, thereby violating RCP 1.7(b).

1.1.2 On October 3, 2003, Paul Matthews and Stacey Matthews were charged with felonies arising from common facts and circumstances. The criminal Information alleged that Paul Matthews stole computer hardware from his employer, the Washington State Department of Transportation, and that Stacey Matthews was complicit in selling the stolen property. [Ex. A-104]

1.1.3 Respondent appeared for and represented both Paul Matthews and Stacey Matthews. Respondent also undertook to represent Paul Matthews in a wrongful termination of employment claim against the Department of Transportation. The civil case representation was provided in accordance with a percentage contingent fee agreement. Respondent was hopeful of obtaining the largest contingent fee of his career from the case. Respondent believed that findings of guilty or pleas of guilty by either Paul or Stacey Matthews would prejudice Mr. Matthews' wrongful termination claim. Respondent negotiated *Alford* pleas for both to avoid prejudicing the civil case. Respondent received no

fee for the criminal representation, felt he was entitled to a fee from the civil case and did not want another attorney involved in the criminal case for fear it would upset his strategy for maximizing the potential for recovery in the civil case.

1.1.4 Respondent's legal representation of Paul Matthews might have been materially limited by Respondent's representation of Stacey Matthews. Respondent's representation of Stacey Matthews might have been materially limited by his representation of Paul Matthews. Respondent knew that joint representation may materially limit an attorney's representation of one client, the other or both.

1.1.5 The Matthews and Respondent had some discussion about his joint representation but no witness was able to recall the details of Respondent's disclosure of material facts to the Matthews regarding joint representation or their pleas of guilty. Neither Paul Matthews nor Stacey Matthews consented in writing to joint representation.

1.1.6 By his conduct, Respondent negligently exposed both his clients and the administration of justice to potential harm.

1.2 Count II

1.2.1 Respondent is charged in Count II of the Association's Formal Complaint with obstructing and delaying the Association's investigation of Respondent's joint representation of Paul and Stacey Matthews and thereby violating RPC 3.1, 3.4(a), 3.4(c), 3.4(d), 8.4(d), and 8.4(l). The undersigned Hearing Officer makes the following Findings of Fact with respect to Count II.

1.2.2 By letter to Respondent dated February 16, 2005, King County Superior Court Judge Helen L. Halpert questioned whether Respondent had a conflict of interest due to his involvement in certain lawsuits. Judge Halpert provided a copy to the Association. [Ex. R-1]. The Association proceeded with an investigation into Respondent's role in those and other cases. In furtherance of that investigation, the Association, by letter dated May 9, 2005, requested that Respondent provide (1) copies of any documents by which Paul Matthews and/or Stacey Matthews consented to common representation and (2) copies of any documents transmitted by Respondent to Paul Matthews relating to a suspected business transaction between Respondent and Paul Matthews. [Ex. A-402]

1.2.3 Respondent requested deferral of the Association's investigation pending conclusion of two civil cases – *Matthews v. Washington State Department of Transportation* and *Paul King v. Matthews*. [Ex. A-403] The latter was one of the cases identified by Judge Halpert as contributing to an apparent ongoing conflict of interest. Respondent provided no reasonable basis for deferral of the Association's investigation. Respondent's request for deferral was motivated by an intent to delay the Association's investigation. The deferral request delayed the Association's investigation. [Ex. A-422]

1.2.4 On October 18, 2005, the Association served Respondent with two subpoenaes duces tecum for document production and an investigatory deposition. [Ex. A-413] The deposition was rescheduled at Respondent's request for November 1, 2005. Respondent appeared on that date but failed to produce the subpoenaed documents.

Respondent provided no substantive testimony, instead asserting he was terminating the deposition because it was "oppressive." [Ex. A-416].

1.2.5 On November 3, 2005 Respondent filed a Motion and Declaration to Terminate and/or Limit Scope of Deposition. [Ex. A-417]. The bases for objection to the deposition, insofar as it related to the Matthews investigation, included Respondent's challenge to the term "business transaction" in RPC 1.8(a) and the scope of the Association's authority to investigate whether Respondent had a business transaction with his client, and that disciplinary counsel was engaged in a "fishing expedition." These objections were frivolous and were interposed for the purpose of delaying and frustrating the Association's investigation.

1.2.6 Respondent's conduct resulted in harm to the WSBA lawyer disciplinary system in the form of increased cost and delay.

1.3 Count IV

1.3.1 Respondent is charged in Count IV of the Formal Complaint with obstructing and delaying the investigation of a grievance by Kurt R. Rahrig and thereby violating RPC 3.1, 3.4(a), 3.4(c), 3.4(d), 8.4(d), 8.4(j), and 8.4(l). The undersigned Hearing Officer makes the following Findings of Fact with respect to Count IV.

1.3.2 On June 6, 2005, the Association requested that Respondent reply to a grievance filed by Kurt Rahrig. After some delay, Respondent provided a written response. On October 18, 2005, the Association served Respondent with a subpoena duces tecum requiring his appearance at a deposition scheduled for October 26, 2005. The

subpoena duces tecum was independent of that relating to the Matthews investigation. The deposition was rescheduled at Respondent's request for November 1, 2005. Respondent appeared on that date but failed to produce the subpoenaed documents. Respondent provided no substantive testimony, instead asserting he was terminating the deposition because it was "oppressive." [Ex. A-416]. *See* Finding of Fact 1.2.4.

1.3.3 Respondent objected to the Rahrig investigation subpoena duces tecum and moved to terminate on the grounds that the Washington State Bar Association lacked jurisdiction to investigate whether Respondent assisted another Washington attorney in practicing during a period of suspension and that the Bar Association was attempting to "force an attorney to testify against a client." These objections lacked a factual and legal basis and were interposed for the purpose of delaying and frustrating the Association's investigation of the Rahrig complaint. The jurisdictional argument was frivolous. Respondent's motion was denied.

1.3.4 On May 11, 2006, the Association served Respondent with another subpoena duces tecum requiring him to appear and produce documents at a deposition scheduled for May 19, 2006, at the Association's office. On that date, approximately one and one-half hours before the deposition was to begin, Respondent personally delivered to the Association's office a letter stating that he refused to attend the deposition because he had not been tendered "travel fees" pursuant to RCW 2.40.020. Respondent failed to appear in response to the subpoena duces tecum. Respondent's failure to appear and refusal to produce

documents was motivated not by a good faith objection to procedure but instead was motivated by intent to delay and frustrate the Association's investigation.

1.3.5 On June 13, 2006, Respondent was served with a third subpoena duces tecum requiring his appearance for a deposition and production of documents regarding the Rahrig grievance. [Ex. A-431] The Association removed Respondent's previous objection by tendering a check to Respondent in the amount of $12 compensating him for the 1.3 mile journey from Respondent's office to the Association's office – the location of the deposition. Respondent personally appeared in response to the subpoena but refused to be sworn, refused to answer questions and produced no documents. [Ex. A-433] On July 6, 2006, Respondent filed a Motion and Declaration to Terminate Deposition of John Scannell, Motion to Quash Subpoena. [Ex. A-434] The bases offered in support of the motion included Respondent's stated assumptions that the deposition questioning would seek testimony regarding its investigation of another attorney and that the Association would inquire into matters protected by attorney-client privilege. Respondent further objected on the grounds that the Association had not given notice of the deposition to the attorney in the other bar investigation. [Ex. A-434] Respondent's failure to produce documents and refusal to testify in response to the subpoena duces tecum lacked a factual basis and were motivated by intent to delay and frustrate the Association's investigation.

1.3.6 Respondent's Motion to Terminate was denied and Respondent was ordered to produce documents and appear for a deposition. [Ex. A-439]

1.3.7 Respondent thereafter filed a Motion contending that the Disciplinary Board, to whom he had directed his Motion to Terminate and who had issued the Order denying the Motion and compelling his cooperation, did not have jurisdiction to rule on the Motion. The Motion was denied. [Ex. A-446] Respondent's Motion to Set Aside or Stay Order was not motivated by a good faith objection but was motivated by intent to delay and frustrate the Association's investigation. [Ex. A-441]

1.3.8 Respondent's deposition was scheduled and then re-scheduled for September 25, 2006 to accommodate Respondent's schedule. [Ex. A-444] On September 25, 2006 Respondent did not appear but provided a letter to the Association stating in part:

> I will not be attending the deposition this morning ... I would like to comply but unfortunately the way this deposition is being conducted raises very serious issues regarding lack of due process as well as how the constitutionality of the rules and how they are interpreted. [sic]
>
> My intent is to raise these issues before the court system. It is clear to me that attending the deposition would render any court action moot. [Ex. A-448]

1.3.9 Respondent's failure to appear and give testimony and failure to produce documents was motivated not by well-grounded objection to procedure but instead was motivated by an intention to delay and frustrate the Association's investigation.

1.3.10 Not until the third day of the instant hearing did Respondent produce documents, at which time Respondent advised that he did not know if additional documents within the scope of the Association's subpoenaes duces tecum and ELC 5.5(b) request existed because he had not fully searched his computer. Whether additional documents within the

scope of the subpoenaes duces tecum and the ELC 5.5(b) request existed when they were served remains unknown to the Association and the Hearing Officer.

1.4 Respondent's conduct resulted in harm to the WSBA lawyer disciplinary system in the form of increased cost and delay. Respondent's failure to make full disclosure of documents impaired the Association's ability to complete its investigation.

II. CONCLUSIONS OF LAW

With respect to Counts I, II and IV of the Formal Complaint, the undersigned Hearing Officer makes the following Conclusions of Law.

Count I

2.1 In failing to obtain the Matthews' written consent to common representation, Respondent negligently violated RPC 1.7(b).

Count II

2.2 In failing to comply with the Association's subpoenaes duces tecum and in failing to cooperate in the Association's investigation of Respondent's joint representation of Paul Matthews and Stacey Matthews and in being motivated by intention to delay and frustrate the Association's investigation, Respondent knowingly violated RPC 3.1 and RPC 8.4(l).

Count IV

2.3 In failing to comply with the Association's subpoenaes duces tecum and the Association's investigation of Mr. Rahrig's grievance and in being motivated by intention to

delay and frustrate the Association's investigation, Respondent knowingly violated RPC 8.4(l).

Affirmative Defenses

2.4 Respondent's contentions that the WSBA investigations and the Formal Complaint are in retaliation for his grievance filed against former Attorney General Christine Gregoire, that he is the victim of selective enforcement by the Association, that disciplinary counsel pursued the investigations and filed the Formal Complaint out of personal animus, and that the Association's investigation furthers a "creeping police state" are unsupported.

Presumptive Sanction

2.5 Count I. The presumptive sanction for Respondent's negligent violation of RPC 1.7 is reprimand. *See* ABA Standard § 4.33.

2.6 Count II. The presumptive sanction for Respondent's knowing violation of RPC 3.1 and RPC 8.4(l) is suspension.

2.7 Count IV. The presumptive sanction for Respondent's knowing violation of RPC 8.4(l) is suspension.

Aggravating Factors

2.8 In accordance with the ABA Standard § 9.22, the following aggravating factors are found applicable to this case:

2.8.1 Respondent previously was admonished (failing to supervise a non-legal assistant in violation of RPC 5.3(a) and 5.3(b)). [Ex. A-500]

2.8.2 In acting to frustrate and delay the Association's investigation, Respondent demonstrated a selfish motive.

2.8.3 Respondent is found to have committed multiple offenses.

2.8.4 Respondent, while acknowledging his acts, has refused to acknowledge the wrongful nature of his conduct.

2.8.5 Paul Matthews and Stacey Matthews were vulnerable victims.

Mitigating Factors

2.9 None.

III. RECOMMENDATION

3.1 The Hearing Officer recommends that Respondent be suspended for a period of two years. The Hearing Officer further recommends that the suspension continue until Respondent provides satisfactory proof that all documents within the scope of the subpoenaes duces tecum and the Association's ELC 5.5(b) request have been identified by competent and thorough search and provided to the Association.

DATED this 31 day of JANUARY 2009.

Timothy J. Parker, Hearing Officer

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
Phone: 206-622-8020
Fax: 206-467-8215

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FF, Conc, HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to John Scannell Respondent/Respondent's Counsel at POB 3241, Seattle, WA 98124 by Certified/first class mail, postage prepaid on the 3 day of February, 2009.

Becky Clay
Clerk/Counsel to the Disciplinary Board

APPENDIX C

BEFORE THE DISCIPLINARY BOARD
OF THE WASHINGTON STATE BAR ASSOCIATION

JOHN R. SCANNELL, Lawyer	**No. 08#00074** **RESPONSE TO MOTION FOR PROTECTIVE ORDER, RESPONSE TO MOTION TO ALLOW DISCOVERY; MOTION TO REMAND TO REVIEW COMMITTEE, MOTION FOR CR 30(B)(6) DEPOSITON OF DAVIS WRIGHT TREMAIN**

By submitting this response, the above named lawyer does not concede that this proceeding has any legal basis, nor does he concede jurisdiction in any way.

The above named lawyer opposes the Bar Association's motion for a protective order and responds to the arguments raised by counsel as follows:

While Disciplinary counsel now claims her charges were based only upon a failure to attend a deposition, which the lawyer has conceded, this is not the basis she obtained the right to charge under the letter that was submitted to the review committee. She obtained the right to charge by claiming much more misconduct which she now claims is in the original charge. If this is true, then this charge must be dismissed and remanded to the review committee for the drafting of charges that is consistent with the intent of the review committee. And if that is done,

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more defects in the original charge must be corrected before this court can obtain jurisdiction.

On page 6 of her response, Disciplinary counsel contends that "the formal complaint does not charge he failed to respond to an email." Instead, it charges, and the Respondent has admitted, that DWT "mailed" a deposition notice in April 2005, and yet Respondent did not inform his client of the deposition and neither Respondent, nor his client, appeared for the scheduled deposition."

While the above statement may be true, this is not the basis upon which disciplinary counsel obtained the right to charge the respondent lawyer. On July 21, 2008, disciplinary counsel, in her sanction analysis, contended "the actual/potential injury appears to be that Mr. Wyant lost his day in court." It was on this basis, that the review allowed charges to be brought.

In actuality, the defendant lost his day in court, not just because a notice of deposition was misplaced, but because opposing counsel argued, in addition to the notice, two emails and a fax were sent supposedly reminding him of the deposition and they were likewise ignored. It was on the basis of that allegation that the case was dismissed.

The above lawyer contends that if there is someone to be disciplined, it should be opposing counsel Shubert, not the undersigned lawyer. She committed a fraud upon the court, by claiming to send emails she didn't.

Of course, the disciplinary counsel would like this credibility issue decided by a fact finder who could observe only the demeanor of the witnesses. But why should the fact finder only consider demeanor when there is physical evidence available that would show who mislead the court? According to Sheehan, it would be very difficult to retroactively go back fake an email. He is familiar with the servers involved and if in fact she did not send the emails in question, DWT's server would show it. The complainant filed this charge because he lost his day in court because someone claimed responding counsel was notified four times of the

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deposition, not once. This is not a tangential issue as claimed by disciplinary counsel, but central to the very reason the complaining party brought the charge.

Disciplinary counsel now seeks to claim as irrelevant, a charge brought by the lawyer nine years ago. In that charge, the lawyer charged that Christine Gregoire should have been disciplined in the Beckman case because she supervised the attorneys that did not file a notice of appeal within 30 days, that cost taxpayers 17 million dollars. Unknown to the lawyer at the time, one of the attorneys involved in the failure to file a notice was Lorretta Lamb, who just happened to be chairman of the WSBA Disciplinary Board. At the time, Lamb apparently used her influence to misdirect the investigation away from herself by having the board hold a press conference announcing an investigation of her co-counsel, Janet Capp. When lawyer Scannell filed the grievance against Gregoire, the response was immediate. A subpoena was issued demanding 3 years of his calendaring, even though his calendars were not remotely connected to any pending grievance.

Since that time, responding lawyer has had to spend approximately 30% of his practice dealing with bar complaints that were solicited by disciplinary counsel to retaliate for exposing Gregoire and Lamb. This latest indictment is the latest of many. All of the admissions requested are necessary to show that the intent of Disciplinary counsel and the review committee in bringing these charges was to cover misconduct by members of the disciplinary board in failing to hold Gregoire and Lamb accountable for the loss of the Beckman case.

Disciplinary counsel makes the incredible argument that because grievance investigations are confidential, then the board is somehow immune from conceding facts that are generally known to the pubic. In looking at the requested admissions, she has not pointed to a single admission that could not be readily determined from facts that are generally known to the public. If these facts are admitted, as they should be, then it will cut the costs of the lawyer in proving the present charges are a continuation of charges that have been unrelentingly brought against

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him for eight years.

Disciplinary counsel also complains that Requests for admission 19-23 are unrelated to this case. It is the contention of the lawyer that the present charges were improperly brought. He contends that the review committee members violated ELC 2.3(h) by voting to bring these charges without addressing a motion for disqualification that was brought by the responding lawyer. They ignored it. Disciplinary counsel may argue the failure to address the disqualification motion was inadvertent. However, in the two related cases, the undersigned attorney also brought motions for disqualification that were likewise ignored. This would demonstrate that the failure to address the disqualification motion was not inadvertant, but in fact part of a pattern and practice to harass a whistleblower who exercised his first amendment rights by continuing to bring charges, and ignore motions to disqualify that should have been addressed.

While grievance investigations are confidential, the obligation to put on the public record a response to a motion to disqualify should not be. Minutes of the review committee are public records and the minutes should reflect the decision of the board has addressed a motion for disqualification.

Disciplinary counsel argues that other request are burdensome claiming that the disciplinary board does not maintain such information on the impact of their selection procedures. If they don't maintain this information, they should be. According to the Uniform guidelines on employee selection procedures, 41 CFR 60-3.4. any agency covered by Title seven are required to "maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B of this section in order to determine compliance with these guidelines." 41 CFR 60-3. According to 41 CFR 60-3.10 all employee agencies and employee services are required to comply with this requirement. Under that section

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> An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

In interpreting this section the EEOC has developed formal questions and answers that indicate that licensing boards are subject to this requirement:

> **3. Q. Who is covered by the Guidelines?**
> A. The Guidelines apply to private and public employers, labor organizations, employment agencies, apprenticeship committees, licensing and certification boards (see Question 7),
> ...
> **7. Q. Do the Guidelines apply to the licensing and certification functions of state and local governments?**
> A. The Guidelines apply to such functions to the extent that they are covered by Federal law. Section 2B. The courts are divided on the issue of such coverage. The Government has taken the position that at least some kinds of licensing and certification which deny persons access to employment opportunity may be enjoined in an action brought pursuant to Section 707 of the Civil Rights Act of 1964, as amended...

Undersigned counsel argues that employers who employ attorneys could definitely be subject to Title VII, so the WSBA would be a certification board that would be required to disclose the impact of its licensing requirements if called upon to do so by the EEOC. The undersigned is merely asking the board to supply information that it is required by federal law to maintain and requests that the hearing examiner order the information be produced.

The undersigned now concedes he cannot bring a motion to enter land and has withdrawn that, but still contends he can bring CR 30(b)(6) deposition request on Davis Wright Tremain to

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force the disclosure of information that demonstrates that Janet Shubert committed a fraud upon the court, and the case was dismissed for that reason and not the reason given by Disciplinary counsel in her charging letter to the review committee. For that reason, the undersigned still requests a 30(b)(6) deposition of the person most able to answer questions about email data maintained on the server in question for the relevant time periods.

Dated this 28th day of August, 2009,

John Scannell, WSBA #31035

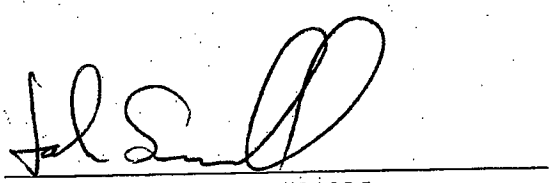
Declaration

Undersigned declares as follows:

Attached is a true and correct copy of the letter sent to the review committee by disciplinary counsel in this case on July 21, 2008.

I declare under the penalty of perjury of the State of Washington that the foregoing is true and correct.

Dated this 28th day of August, 2009,



John Scannell, WSBA #31035

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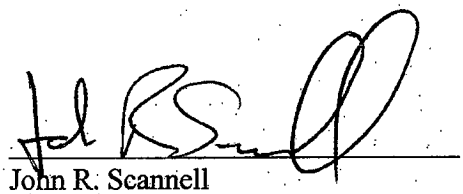
I certify that I delivered a copy of this document to

Linda Eide
1325 4th Ave., Suite 600
Seattle, WA., 98101-2539

on this date by mailing it certified mail, return receipt requested I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of August, 2009 at Seattle, Wa.,



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WSBA
OFFICE OF DISCIPLINARY COUNSEL

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July 21, 2008

Calvin and Roxanne Wyant
29860 42nd Ave S
Auburn WA 98001

John R. Scannell
Attorney at Law
PO Box 3254
Seattle WA 98117-3254

Re: Calvin and Roxanne Wyant grievance against John Scannell
WSBA File No. 07-01643

Dear Mr. and Ms. Wyant and Mr. Scannell:

We have completed our investigation and write to advise you of our conclusions before we report this matter to a Review Committee of the Disciplinary Board. Our analysis is based on interviewing the grievants, and reviewing the court file, Calvin Wyant's client file, and the documentation listed at the end of this letter.

Based on our investigation, we are recommending that the Review Committee order the matter to hearing. If you wish to provide additional information or address our analysis, you should send it to me before August 1, 2008. The Review Committee will be provided with the documentation listed at the end of this letter and anything further that you send to us. All materials will become public when and if the Review Committee orders the matter to hearing or orders an admonition be issued, unless the materials are covered by a protective order.

Mr. Scannell represented Calvin Wyant in his lawsuit against Calvin's former employer. After Mr. Scannell missed a deposition and otherwise failed to diligently prosecute his client's case, it was dismissed and the Court sanctioned Mr. Scannell.

FACTS AS DISCLOSED BY INVESTIGATION

Mr. Wyant worked as a commercial truck driver. On October 1, 2001, during a routine inspection, a truck scale employee noticed an odor of alcohol while inspecting Mr. Wyant's paperwork. The Washington State Patrol (WSP) then tested Mr. Wyant for alcohol. While he

tested below the legal limit for Driving Under the Influence (DUI), the WSP issued a citation for "commercial driver license driver with alcohol in system over 0.04 BAC." After conducting field sobriety tests and a BAC registering .069 at 1:30 p.m., the trooper concluded that Mr. Wyant "was not significantly impaired by alcohol, however, it was definitely present in his system." Mr. Wyant appears to have been cooperative and admitted he drank "probably eight or nine beers" the night before. A company manager picked Mr. Wyant up from the inspection site, sent him for testing, and then sent him home. The employer suspended Mr. Wyant without pay.

Based on the citation, Mr. Wyant's employer was required by federal regulations to refer him to a Substance Abuse Professional (SAP) for alcohol evaluation and possible treatment. The company could not employ him as a commercial driver until the evaluator released him.

In November 2001, Mr. Wyant asked several times to be laid-off from his employment so that he could collect unemployment insurance. The company agreed to the termination request.

On January 18, 2002, the Snohomish County District Court dismissed Case No. C413688, the citation issued for commercial driver's license driver with alcohol in system. Mr. Wyant orally asked the office manager about reinstatement, but he was informed his position had been filled.

On April 25, 2002, a United States Department of Transportation (DOT) attorney advised Mr. Wyant's employer's compliance manager that because the citation had been dismissed and that citation was the sole basis for referring Mr. Wyant to the SAP, "Mr. Wyant may immediately resume driving a CMV... without violating our regulations." But as the Wyants subsequently learned, nothing in DOT regulations required the employer to reemploy Mr. Wyant.

When Mr. Wyant hired Mr. Scannell, he sued the former employer and captioned the case in King County Superior Court. He served the employer in August 2004, but he never filed the complaint despite defense counsel's requests that he do so. Mr. Scannell's office practices made it difficult or impossible for defense counsel to contact him. On August 12, 2004, the employer removed the action to federal court where it received case number CV4-1775M.

On January 28, 2005, Mr. Scannell filed a Second Amended Complaint against the employer alleging that Mr. Wyant's termination violated the employee handbook and thus constituted a breach of contract or wrongful discharge. The Court set an October 31, 2005 trial date.

In its Answer, Mr. Wyant's employer denied liability. It "admits that it complied with Plaintiff's request that it terminate him prior to his DUI citation hearing, and that Plaintiff did not request reinstatement following the Court's disposition of his citation...."

Mr. Scannell refused to amend the complaint even after defense counsel advised him that he had not properly named the defendant employer. He refused to produce a joint status report by the deadline, prompting defense counsel to request a status conference. Mr. Scannell arrived 30 minutes late for that meeting. After the conference, he named the proper defendant. He failed to make initial disclosures by January 5, 2005, as required by Rule 26 of the Federal Rules of Civil Procedure (FRCP).

On February 23, 2005, defense counsel served discovery requests and requested times when she could take Mr. Wyant's deposition. Without requesting an extension, and after promising

responses several times, Mr. Scannell provided discovery responses on April 11, 2005, 19 days late. See FRCP 33(b)(3) (responses due within 30 days). Mr. Scannell did not respond to the request to provide available dates for Mr. Wyant's deposition.

On April 11, 2005, Defendant mailed a notice setting Calvin Wyant's deposition on April 26, 2005. Neither Mr. Scannell, nor Mr. Wyant appeared for the deposition. Later, in a declaration to the Court, Mr. Scannell wrote: "Apparently it [the mailed deposition notice] got misplaced with mail from another Federal case." Mr. Wyant did not know his deposition had been scheduled.

On April 28, 2005, the employer moved to dismiss Mr. Wyant's complaint based on his failure to comply with discovery deadlines and failure to prosecute the case. On May 20, 2005, the Honorable Ricardo S. Martinez signed an Order Dismissing Plaintiff's Claims for Failure to Cooperate with Discovery, citing not only Mr. Scannell's failure to attend Mr. Wyant's deposition as scheduled, but also his earlier failures to cooperate with opposing counsel or meet court deadlines. Judge Martinez also sanctioned Mr. Scannell $1,939 for "Defendant's costs associated with counsel's failure to cooperate in discovery, including his failure to attend Plaintiff's deposition." In his response, Mr. Scannell states that he advised Mr. Wyant of his right to appeal, and "he chose not to."

VIOLATION ANALYSIS

By preparing a complaint but then failing to serve it, and by failing to cooperate with discovery and disclosure deadlines and failing to notify his client of his scheduled deposition and missing the deposition, it appears that Mr. Scannell may have violated former RPC 1.3 (diligence), RPC 3.2 (failure to expedite litigation), and/or RPC 8.4(d) (conduct prejudicial to the administration of justice).

By failing to keep the client reasonably informed or explaining matters, it appears that Mr. Scannell may have violated former RPC 1.4 (communication).[1]

Because it appears that Mr. Scannell may have violated the RPC, we will forward this matter to a Review Committee for its consideration. The Review Committee has wide discretion and may dismiss the grievance, dismiss with an advisory letter, issue an admonition or order the matter to a hearing for a public determination of the violations and the appropriate disciplinary sanction.

SANCTION ANALYSIS

The Washington Supreme Court has held that the American Bar Association Standards for Imposing Lawyer Sanctions (1991 ed. & Feb. 1992 Supp.) (ABA Standards) provide the appropriate framework to impose disciplinary sanctions. In re Disciplinary Proceeding Against Halverson, 140 Wn.2d 475, 492, 998 P.2d 833 (2000); In re Disciplinary Proceeding Against Johnson, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990). The ABA Standards require examination of (1) the duty violated, (2) the lawyer's mental state, (3) the extent of actual or potential for injury caused by the lawyer's conduct, and (4) aggravating and mitigating factors.

[1] The RPC were amended effective September 1, 2006. We rely on the former RPCs in effect at the time of the alleged misconduct.

The nature of the duty violated together with the lawyer's mental state and any potential injury generally determine the presumptive sanction to be applied. ABA Standards section 4.4 is most applicable to the duty to act diligently and to communicate with the client. ABA Standards section 6.2 applies to the duty to expedite litigation. In this case, ABA Standards section 7.0 is most applicable to the duty to avoid conduct prejudicial to the administration of justice (see enclosed).

It appears Respondent acted at least negligently. The actual/potential injury appears to be that Mr. Wyant lost his day in court. Most importantly, no tribunal evaluated the perceived conflict in state and federal law. The presumptive sanction appears to be reprimand.

Aggravating or mitigating factors may cause the sanction to vary from the presumptive sanction. Under ABA Standards Section 9.22, we believe the following aggravating factors are present in this case:

(a) prior disciplinary offenses: Mr. Scannell received an admonition effective November 10, 2005 for violating RPC 5.3 (responsibilities regarding nonlawyer assistants); and
(d) multiple offenses.

We believe no mitigating factors exist.

CONCLUSION

Based on our investigation and the ABA Standards as discussed above, the Office of Disciplinary Counsel is recommending that the Review Committee order the matter to hearing. The Review Committee will advise you of its decision.

Very truly yours,

Linda B. Hide
Senior Disciplinary Counsel

Enc. to Mr. Scannell: Grievant's July 9, 2008 facsimile

DOCUMENTATION

1. ✓ Disciplinary Counsel's analysis letter (with attachments, if applicable)

2. ✓ Grievance
   - Grievance received on October 10, 2007

3. ✓ Respondent's response to grievance
   - Response received on December 4, 2007

41 CFR 60-3.4 - Information on impact.

- **Section Number:** 60-3.4
- **Section Name:** Information on impact.

A. Records concerning impact. Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B of this section in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. Applicable race, sex, and ethnic groups for recordkeeping. The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), of this part.

C. Evaluation of selection rates. The ``bottom line.'' If the information called for by sections 4A and B of this section shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest rec- ords) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in paragraphs (1) and (2) of this section, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. Adverse impact and the ``four-fifths rule.'' A selection rate for any race, sex, or ethnic group which is less than four-fifths (\4/5\)

(or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. Consideration of user's equal employment opportunity posture. In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

41 CFR 60-3.10 - Employment agencies and employment services.

- **Section Number:** 60-3.10
- **Section Name:** Employment agencies and employment services.

A. Where selection procedures are devised by agency. An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. Where selection procedures are devised elsewhere. Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals

pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

Questions and Answers on the Uniform Guidelines on Employee Selection Procedures

Following is the text of questions and answers designed to provide guidance on the Uniform Guidelines on Employee Selection Procedures. The introductory text and the first 90 Q&A's, issued by the Office of Federal Contract Compliance Programs, the Equal Employment Opportunity Commission, the Department of Justice, the Office of Personnel Management, and the Treasury Department were printed in the March 2, 1979, Federal Register (44 Fed. Reg. 11,996). Three additional Q&A's (91-93) were published by the same agencies in the May 2, 1980, Federal Register (45 Red. Reg. 29,530).

ADOPTION OF QUESTIONS AND ANSWERS TO CLARIFY AND PROVIDE A COMMON INTERPRETATION OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

INTRODUCTION

The problems addressed by the Uniform Guidelines on Employee Selection Procedures (43 FR 38290 et seq., August 25, 1978) are numerous and important, and some of them are complex. The history of the development of those Guidelines is set forth in the introduction to them (43 FR 38290-95). The experience of the agencies has been that a series of answers to commonly asked questions is helpful in providing guidance not only to employers and other users, but also to psychologists and others who are called upon to conduct validity studies, and to investigators, compliance officers and other Federal personnel who have enforcement responsibilities.

The Federal agencies which issued the Uniform Guidelines – the Departments of Justice and Labor, the Equal Employment Opportunity Commission, the Civil Service Commission (which has been succeeded in relevant part by the Office of Personnel Management), and the Office of Revenue Sharing, Treasury Department – recognize that the goal of a uniform position on these issues can best be achieved through a common interpretation of the same guidelines. The following Questions and Answers are part of such a common interpretation. The material included is intended to interpret and clarify, but not to modify, the provisions of the Uniform Guidelines. The questions selected are commonly asked questions in the field and those suggested by the Uniform Guidelines themselves and by the extensive comments received on the various sets of proposed guidelines prior to their adoption. Terms are used in the questions and answers as they are defined in the Uniform Guidelines.

The agencies recognize that additional questions may be appropriate for similar treatment at a later date, and contemplate working together to provide additional guidance in interpreting the Uniform Guidelines. Users and other interested persons are invited to submit additional questions.

I. PURPOSE AND SCOPE

1. Q. What is the purpose of the guidelines?
A. The guidelines are designed to aid in the achievement of our nation's goal of equal employment opportunity without discrimination on the grounds of race, color, sex,, religion or national origin. The Federal agencies have adopted the Guidelines to provide a uniform set of principles governing use of employee selection procedures which is consistent with applicable legal standards and validation standards generally accepted by the psychological profession and which the Government will apply in the discharge of its responsibilities.

2. Q. What is the basic principle of the Guidelines?
A. A selection process which has an adverse impact on the employment opportunities of members of a race, color, religion, sex, or national origin group (referred to as "race, sex, and ethnic group," as defined in Section 16P) and thus disproportionately screens them out is unlawfully discriminatory unless the process or its component procedures have been validated in accord with the Guidelines, or the user otherwise justifies them in accord with Federal law. See Sections 3 and

6. This principle was adopted by the Supreme Court unanimously in *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175, and was ratified and endorsed by the Congress when it passed the Equal Employment Opportunity Act of 1972, which amended Title VII of the Civil Rights Act of 1964.

3. Q. Who is covered by the Guidelines?

A. The Guidelines apply to private and public employers, labor organizations, employment agencies, apprenticeship committees, licensing and certification boards (see Question 7), and contractors or subcontractors, who are covered by one or more of the following provisions of Federal equal employment opportunity law: Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter Title VII); Executive Order 11246, as amended by Executive Orders 11375 and 12086 (hereinafter Executive Order 11246); the State and Local Fiscal Assistance Act of 1972, as amended; Omnibus Crime Control and Safe Streets Act of 1968, as amended; and the Intergovernmental Personnel Act of 1970, as amended. Thus, under Title VII, the Guidelines apply to the Federal Government with regard to Federal employment. Through Title VII they apply to most private employers who have 15 or more employees for 20 weeks or more a calendar year, and to most employment agencies, labor organizations and apprenticeship committees. They apply to state and local governments which employ 15 or more employees, or which receive revenue sharing funds, or which receive funds from the Law Enforcement Assistance Administration to impose and strengthen law enforcement and criminal justice, or which receive grants or other federal assistance under a program which requires maintenance of personnel standards on a merit basis. They apply through Executive Order 11246 to contractors and subcontractors of the Federal Government and to contractors and subcontractors under federally-assisted construction contracts.

4. Q. Are college placement offices and similar organizations considered to be users subject to the Guidelines?

A. Placement offices may or may not be subject to the Guidelines depending on what services they offer. If a placement office uses a selection procedure as a basis for any employment decision, it is covered under the definition of "user", Section 16. For example, if a placement office selects some students for referral to an employer but rejects others, it is covered. However, if the placement office refers all interested students to an employer, it is not covered, even though it may offer office space and provision for informing the students of job openings. The Guidelines are intended to cover all users of employee selection procedures, including employment agencies, who are subject to Federal equal employment opportunity law.

5. Q. Do the Guidelines apply only to written tests?

A. No. They apply to all selection procedures used to make employment decisions, including interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance. Sections 2B and 16Q, and see Question 6.

6. Q. What practices are covered by the guidelines?

A. The Guidelines apply to employee selection procedures which are used in making employment decisions, such as hiring, retention, promotion, transfer, demotion, dismissal or referral. Section 2B. Employee selection procedures include job requirements (physical, education, experience), and evaluation of applicants or candidates on the basis of application forms, interviews, performance tests, paper and pencil tests, performance in training programs or probationary periods, and any other procedures used to make an employment decision whether administered by the employer or by an employment agency. See Section 2B.

7. Q. Do the Guidelines apply to the licensing and certification functions of state and local governments?

A. The Guidelines apply to such functions to the extent that they are covered by Federal law. Section 2B. The courts are divided on the issue of such coverage. The Government has taken the position that at least some kinds of licensing and certification which deny persons access to employment opportunity may be enjoined in an action brought pursuant to Section 707 of the Civil Rights Act of 1964, as amended.

8. Q. What is the relationship between Federal equal employment opportunity law, embodied in these Guidelines, and State and Local government merit system laws or regulations requiring rank ordering of candidates and selection from a limited number of top candidates?

A. The Guidelines permit ranking where the evidence of validity is sufficient to support that method of use. State or local laws which compel rank ordering generally do so on the assumption that the selection procedure is valid. Thus, if there is adverse impact and the validity evidence does not adequately support that method of use, proper interpretation of such a state law would require validation prior to ranking. Accordingly, there is no necessary or inherent conflict

between Federal law and State or local laws of the kind described.

Under the Supremacy Clause of the Constitution (Art. VI, C1.2), however, Federal law or valid regulation overrides any contrary provision of state or local law. Thus, if there is any conflict, Federal equal opportunity law prevails. For example, in *Rosenfeld v. So. Pacific Co.*, 444 F.2d 1219 (9th Cir., 1971), 3 FEP Cases 604, the court held invalid state protective laws which prohibited the employment of women in jobs entailing long hours or heavy labor, because the state laws were in conflict with Title VII. Where a State or local official believes that there is a possible conflict, the official may wish to consult with the State Attorney General, County or City attorney, or other legal official to determine how to comply with the law.

II. ADVERSE IMPACT, THE BOTTOM LINE AND AFFIRMATIVE ACTION

9. Q. Do the Guidelines require that only validated selection procedures be used?
A. No. Although validation of selection procedures is desirable in personnel management, the Uniform Guidelines require users to produce evidence of validity only when the selection procedure adversely affects the opportunities of a race, sex, or ethnic group for hire, transfer, promotion, retention or other employment decision. If there is no adverse impact, there is no validation requirement under the Guidelines. Sections 1B and 3A. See also, Section 6A.

10. Q. What is adverse impact?
A. Under the Guidelines adverse impact is a substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a race, sex or ethnic group. Sections 4D and 16B. See Questions 11 and 12.

11. Q. What is a substantially different rate of selection?
A. The agencies have adopted a rule of thumb under which they will generally consider a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5ths) or eighty percent (80%) of the selection rate for the group with the highest selection rate as a substantially different rate of selection. See Section 4D. This "4/5ths" or "80%" rule of thumb is not intended as a legal definition, but is a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion and other selection decisions.

For example, if the hiring rate for whites other than Hispanics is 60%, for American Indians 45%, for Hispanics 48%, and for Blacks 51%, and for each of these groups constitutes more than 2% of the labor force in the relevant labor area (see Question 16), a comparison should be made of the selection rate for each group with that of the highest group (whites). These comparisons show the following impact ratios: American Indians 45/60 or 75%; Hispanics 48/60 or 80%; and Blacks 51/60 or 85%. Applying the 4/5ths or 80% rule of thumb, on the basis of the above information alone, adverse impact is indicated for American Indians but not for Hispanics or Blacks.

12. Q. How is adverse impact determined?
A. Adverse impact is determined by a four step process. (1) Calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from the group). (2) Observe which group has the highest selection rate. (3) Calculate the impact ratios, by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group). (4) Observe whether the selection rate for any group is substantially less (i.e., usually less than 4/5ths or 80%) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances. See Section 4D.

For example:

Applicants	Hires	Selection Rate, % hired
80 White	48	48/80 or 60%
40 Black	12	12/40 or 30%

A comparison of the black selection rate (30%) with the white selection rate (60%) shows that the black rate is 30/60, or one-half (or 50%) of the white rate. Since the one-half (50%) is less than 4/5ths (80%) adverse impact is usually indicated.

The determination of adverse impact is not purely arithmetic however; and other factors may be relevant. See, Section 4D.

13. Q. Is adverse impact determined on the basis of the overall selection process or for the components in that process?
A. Adverse impact is determined first for the overall selection process for each job. If the overall selection process has an adverse impact, the adverse impact of the individual selection procedure should be analyzed. For any selection procedures in the process having an adverse impact which the user continues to use in the same manner, the user is expected to have evidence of validity satisfying the Guidelines. Sections 4C and 5D. If there is no adverse impact for the overall selection process, in most circumstances there is no obligation under the Guidelines

to investigate adverse impact for the components, or to validate the selection procedures used for that job. Section 4C. But see Question 25.

14. Q. The Guidelines designate the "total selection process" as the initial basis for determining the impact of selection procedures. What is meant by the "total selection process"?
A. The "total selection process" refers to the combined effect of all selection procedures leading to the final employment decision such as hiring or promoting. For example, appraisal of candidates for administrative assistant positions in an organization might include initial screening based upon an application blank and interview, a written test, a medical examination, a background check, and a supervisor's interview. These in combination are the total selection process. Additionally, where there is more than one route to the particular kind of employment decision, the total selection process encompasses the combined results of all routes. For example, an employer may select some applicants for a particular kind of job through appropriate written and performance tests. Others may be selected through an internal upward mobility program, on the basis of successful performance in a directly related trainee type of position. In such a case, the impact of the total selection process would be the combined effect of both avenues of entry.

15. Q. What is meant by the terms "applicant" and "candidate" as they are used in the Uniform Guidelines?
A. The precise definition of the term "applicant" depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice.

The term "candidate" has been included to cover those situations where the initial step by the user involves consideration of current employees for promotion, or training, or other employment opportunities, without inviting applications. The procedure by which persons are identified as candidates is itself a selection procedure under the Guidelines.

A person who voluntarily withdraws formally or informally at any state of the selection process is no longer an applicant or candidate for purposes of computing adverse impact. Employment standards imposed by the user which discourage disproportionately applicants of a race, sex, or ethnic group may, however, require justification. Records should be kept for persons who were applicants or candidates at any stage of the process.

16. Q. Should adverse impact determinations be made for all groups regardless of their size?
A. No. Section 15A(2) calls for annual adverse impact determinations to be made for each group which constitutes either 2% or more of the total labor force in the relevant labor area, or 2% or more of the applicable workforce. Thus, impact determinations should be made for any employment decision for each group which constitutes 2% or more of the labor force in the relevant labor area. For hiring, such determination should also be made for groups which constitute more than 2% of the applicants; and for promotions, determinations should also be made for groups which constitute more than 2% of the user's workforce. There are record keeping obligations for all groups, even those which are less than 2%. See Question 86.

17. Q. In determining adverse impact, do you compare the selection rates for males and females, and blacks and whites, or do you compare selection rates for white males, white females, black males and black females?
A. The selection rates for males and females are compared, and the selection rates for the race and ethnic groups are compared with the selection rate of the race or ethnic group with the highest selection rate. Neutral and objective selection procedures free of adverse impact against any race, sex or ethnic group are unlikely to have an impact against a subgroup. Thus there is no obligation to make comparisons for subgroups (e.g., white male, white female, black male, black female). However, there are obligations to keep records (see Question 87), and any apparent exclusion of a subgroup may suggest the presence of discrimination.

18. Q. Is it usually necessary to calculate the statistical significance of differences in selection rates when investigating the existence of adverse impact?
A. No. Adverse impact is normally indicated when one selection rate is less than 80% of the other. The federal enforcement agencies normally will use only the 80% (4/5ths) rule of thumb, except where large numbers of selections are made. See Questions 20 and 22.

19. Q. Does the 4/5ths rule of thumb mean that the Guidelines will tolerate up to 20% discrimination?
A. No. The 4/5ths rule of thumb speaks only to the question of adverse impact, and is not intended to resolve the ultimate question of unlawful discrimination. Regardless of the amount of difference in selection rates, unlawful discrimination may be present,

and may be demonstrated through appropriate evidence. The 4/5ths rule merely establishes a numerical basis for drawing an initial inference and for requiring additional information.

With respect to adverse impact, the Guidelines expressly state (section 4D) that differences in selection rates of less than 20% may still amount to adverse impact where the differences are significant in both statistical and practical terms. See Question 20. In the absence of differences which are large enough to meet the 4/5ths rule of thumb or a test of statistical significance, there is no reason to assume that the differences are reliable, or that they are based upon anything other than chance.

20. Q. Why is the 4/5ths rule called a rule of thumb?

A. Because it is not intended to be controlling in all circumstances. If, for the sake of illustration, we assume that nationwide statistics show that use of an arrest record would disqualify 10% of all Hispanic persons but only 4% of all whites other than Hispanic (hereafter non-Hispanic), the selection rate for that selection procedure is 90% for Hispanics and 96% for non-Hispanics. Therefore, the 4/5ths rule of thumb would not indicate the presence of adverse impact (90% is approximately 94% of 96%). But in this example, the information is based upon nationwide statistics, and the sample is large enough to yield statistically significant results, and the difference (Hispanics are 2 ½ times as likely to be disqualified as non-Hispanics) is large enough to be practically significant. Thus in this example the enforcement agencies would consider a disqualification based on an arrest record alone as having an adverse impact. Likewise in *Gregory v. Litton Industries*, 472 F.2d 631 (9th Cir., 1972), 5 FEP Cases 267, the court held that the employer violated Title VII by disqualifying persons from employment solely on the basis of an arrest record, where that disqualification had an adverse impact on blacks and was not shown to be justified by business necessity.

On the other hand, a difference of more than 20% in rates of selection may not provide a basis for finding adverse impact if the number of persons selected is very small. For example, if the employer selected three males and one female from an applicant pool of 20 males and 10 females, the 4/5ths rule would indicate adverse impact (selection rate for women is 10%; for men 15%; 10/15 or 66% is less than 80%), yet the number of selections is too small to warrant a determination of adverse impact. In these circumstances, the enforcement agency would not require validity evidence in the absence of additional information (such as selection rates for a longer period of time) indicating adverse impact. For recordkeeping requirements, see Section 15A(2)(c) and Questions 84 and 85.

21. Q. Is evidence of adverse impact sufficient to warrant a validity study or an enforcement action where the numbers involved are so small that it is more likely than not that the difference could have occurred by chance?

For example:

Applicants	Not Hired	Hired	Selection Rate, % Hired
80 White	64	16	20
20 Black	17	3	15

White Selection Rate = 20%
Black Selection Rate = 15%
15 divided by 20 = 75% (which is less than 80%)

A. No. If the numbers of persons and the difference in selection rates are so small that it is likely that the difference could have occurred by chance, the Federal agencies will not assume the existence of adverse impact, in the absence of other evidence. In this example, the difference in selection rates is too small, given the small number of black applicants, to constitute adverse impact in the absence of other information (see Section 4D). If only one more black had been hired instead of a white the selection rate for blacks 20% would be higher than that for whites (18.7%). Generally, it is inappropriate to require validity evidence or to take enforcement action where the number of persons and the difference in selection rates are so small that the selection of one different person for one job would shift the result from adverse impact against one group to a situation in which that group has a higher selection rate than the other group.

On the other hand, if a lower selection rate continued over a period of time, so as to constitute a pattern, then the lower selection rate would constitute adverse impact, warranting the need for validity evidence.

22. Q. Is it ever necessary to calculate the statistical significance of differences in selection rates to determine whether adverse impact exists?

A. Yes. Where large numbers of selections are made, relatively small differences in selection rates may nevertheless constitute adverse impact if they are both statistically and practically significant. See Section 4D and Question 20. For that reason, if there is a small difference in selection rates (one rate is more than 80% of the other), but large numbers of selections are involved, it would be appropriate to calculate the statistical significance of the difference in selection rates.

23. Q. When the 4/5ths rule of thumb shows adverse impact, is there adverse impact under the Guidelines?

A. There usually is adverse impact, except where the number